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## IT'S NOT TOO LATE: APPLYING CONTINUING-VIOLATION THEORY TO THE DESIGNATION OF CRITICAL HABITAT UNDER THE ESA

Amelia Boone

*Abstract:* The Endangered Species Act (ESA or the Act) requires the United States Fish and Wildlife Service (the Service) to designate critical habitat for every species it lists as threatened or endangered. Generally, the Service must designate critical habitat within one year of listing the species. If it cannot determine the species' habitat at the moment of listing, it can issue a finding of "not determinable," which gives it one additional year to study the species and its habitat needs. At the end of that additional year, the Service must list the critical habitat, using whatever data is available. On close to 1500 occasions, the Service has failed to designate critical habitat within one year of issuing a "not determinable" finding.

The Service's duty to designate critical habitat is enforceable by private parties under the ESA's citizen-suit provision. Because the ESA does not contain a statute of limitations, these citizen suits are subject to the general federal six-year statute of limitations. Courts have disagreed on how the statute of limitations applies when citizens file claims to force the Service to list critical habitat for a threatened or endangered species. The Eleventh Circuit has held that the statute of limitations time-bars the suits, while three different district courts have tolled the statute of limitations under different theories. This Comment argues that courts should interpret the Service's failure to designate critical habitat as a continuing violation that perpetually tolls the statute of limitations until the Service performs its duty. This approach is consistent with the statute's plain text, and it advances the ESA's single, overriding policy purpose: to protect endangered and threatened species from extinction.

### INTRODUCTION

In 1973, Congress passed the Endangered Species Act (ESA) "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," and "to provide a program for the conservation of such endangered species and threatened species."<sup>1</sup> Congress ordered the Secretary of the Interior,<sup>2</sup> through the Fish and Wildlife Service (the Service), to list threatened and endangered species in the Federal Register "solely on the basis of the best scientific and commercial data available."<sup>3</sup> The Service must—

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1. Endangered Species Act of 1973, Pub. L. No. 93-205, § 2(b), 87 Stat. 884, 885 (1973) (codified as amended at 16 U.S.C. § 1531(b) (2000)). "Species" is defined as "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16).

2. The Endangered Species Act is implemented by the Secretary of the Interior through the Fish and Wildlife Service. *See* 16 U.S.C. § 1532(15). This Comment refers to the Fish and Wildlife Service as the responsible party, thereby involving the Secretary of the Interior.

3. 16 U.S.C. § 1533(b)(1)(A) (2000).

to “the maximum extent prudent and determinable”<sup>4</sup>—designate the species’ critical habitat concurrently with listing a species. If the species’ habitat is not determinable, the Service has “not more than one additional year” to study the situation.<sup>5</sup> After that year, the Service must designate the species’ critical habitat based on whatever data is available at that time.<sup>6</sup>

The Service has designated critical habitat for 508 of the 1353 domestic species it lists as threatened or endangered.<sup>7</sup> Environmental watch groups have frequently filed citizen suits to force the Service to list critical habitat for these species, sometimes more than six years after the Service listed them as threatened or endangered.<sup>8</sup> Because the ESA contains no statute of limitations, the six-year federal statute of limitations<sup>9</sup> applies to these citizen suits. Courts grappling with how the federal statute of limitations affects parties’ citizen-suit enforcement powers have come to differing conclusions.<sup>10</sup>

This Comment argues that courts should toll the statute of limitations for citizen suits brought to compel the Service to designate the critical habitat of endangered and threatened species. Part I describes the history and purpose of the ESA and the process for designating critical habitat. Part II explains the general federal statute of limitations and its policy justifications. Part III introduces the continuing-violation theory and the similar series-of-discrete-violations theory. Part IV examines the conflicting approaches courts have taken when plaintiffs have filed suit more than six years after the Service first breached its mandatory duty to

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4. *Id.* § 1533(a)(3)(A).

5. *Id.* § 1533(b)(6)(C)(ii).

6. *Id.*

7. Letter from Michele Zwartjes, Fish and Wildlife Biologist, Endangered Species Listing Division, to author (July 14, 2008), *available at* <http://www.law.washington.edu/wlr/notes/83washrev403n7.pdf>. Courts recognize that scarce resources have substantially contributed to this failure to designate critical habitat. *See, e.g.*, *Schoeffler v. Kempthorne*, 493 F. Supp. 2d 805, 809 (W.D. La. 2007) (“Stated crassly and starkly, it is money—more accurately, the lack of money—that has precipitated this suit . . . . Unfortunately for all concerned, Congress has declined to curtail the scope of the Fish and Wildlife Service’s duties under the Endangered Species Act, yet has refused to adequately fund the Service to enable it to carry out those duties.”).

8. *See infra* Part IV.

9. 28 U.S.C. § 2401(a) (2000).

10. *See* *Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331 (11th Cir. 2006) (characterizing the failure to designate critical habitat as a one-time violation); *Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv.*, No. 3:07CV00358, 2007 WL 4117978 (D. Or. Nov. 16, 2007) (characterizing the failure as a series of discrete violations); *Schoeffler*, 493 F. Supp. at 820–21 (characterizing the failure as a continuing violation).

designate critical habitat for listed species. Finally, Part V argues that courts should interpret the Service's failure to designate critical habitat as a continuing violation that tolls the statute of limitations until the violation is cured.

## I. CONGRESS PASSED THE ESA TO PROTECT THREATENED AND ENDANGERED SPECIES AND THEIR HABITATS

Enacted in 1973, the ESA provides a comprehensive array of protections for endangered and threatened species and their habitats.<sup>11</sup> Its overriding purpose is species conservation.<sup>12</sup> To accomplish this goal, Congress ordered the Service to designate critical habitat concurrently with listing a species as threatened or endangered.<sup>13</sup> Congress also included a citizen-suit provision, which empowers private parties to enforce many of the Service's mandatory duties.<sup>14</sup>

### A. *Congress Passed the ESA to Protect Threatened and Endangered Species from Extinction*

In 1973, the rate of extinction in the United States was approximately one species per year, and half of all recorded extinctions taking place in the previous two thousand years had occurred since 1923.<sup>15</sup> In the face of this accelerating extinction rate, Congress passed the ESA to protect endangered and threatened species and the habitats upon which they depend.<sup>16</sup> Congress was primarily concerned with conserving habitat in order to protect species viability.<sup>17</sup>

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11. See Josh Thompson, *Critical Habitat Under the Endangered Species Act: Designation, Re-designation, and Regulatory Duplication*, 58 ALA. L. REV. 885, 885–86 (2007); Thomas Darin, *Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 HARV. ENVTL. L. REV. 209, 210–13 (2000).

12. 16 U.S.C. § 1531(b) (2000) (“The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species . . .”).

13. See *id.* § 1533.

14. See *id.* § 1540(g).

15. 119 CONG. REC. 30,165 (1973) (statement of Rep. Grover).

16. See *id.*

17. See Darin, *supra* note 11, at 212–13; H.R. REP. NO. 95-1625, at 5 (1978) (“The loss of habitat for many species is universally cited as the major cause for the extinction of species worldwide.”).

*B. The ESA Requires the Fish and Wildlife Service to Protect Critical Habitat for Threatened and Endangered Species*

The ESA requires the Service to identify endangered and threatened species and issue regulations necessary to protect them.<sup>18</sup> As part of this duty, the Service must designate critical habitat for a species concurrently with listing it as threatened or endangered.<sup>19</sup> A species' critical habitat is defined as:

- (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
- (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.<sup>20</sup>

The ESA requires a two-way exchange between the Service and federal agencies with regard to critical habitat. First, the Service must consult with federal agencies to ensure that the agencies' actions do not result in the "destruction or adverse modification" of critical habitat.<sup>21</sup> Second, an agency must consult with the Service any time the agency seeks permitting or licensing changes that could potentially encroach on critical habitat.<sup>22</sup>

The Service also has ongoing obligations to endangered and threatened species themselves, beyond protecting their habitats. The Service must coordinate with agencies to ensure that their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species . . . ."<sup>23</sup> The Service must also conduct a review of every threatened or endangered species at least once every five years to determine whether it should change the species' status from

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18. 16 U.S.C. § 1533(a), (d) (2000).

19. *Id.*

20. *Id.* § 1532(5)(A).

21. *Id.* § 1536(a)(2).

22. *See id.* § 1536(a)(2), (3).

23. *Id.* § 1536(a)(2).

threatened to endangered, or vice versa, or remove it from the list of endangered and threatened species altogether.<sup>24</sup>

There are two exceptions to the Service's duty to designate habitat concurrently with listing a species as threatened or endangered. First, the Service need not designate critical habitat if doing so would be "not prudent."<sup>25</sup> Designation is not prudent if "[t]he species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species," or if "critical habitat would not be beneficial to the species."<sup>26</sup> Second, the Service may delay the designation for one additional year if it determines that the critical habitat of such species is "not then determinable."<sup>27</sup> A "not determinable" finding means there is not enough information to analyze the impacts of habitat designation, or that the biological needs of the species are not well known.<sup>28</sup> If the Service issues such a finding, it has one more year to research the species and its environment.<sup>29</sup> The Service must publish a final regulation at the end of that year, based on the data available at that time.<sup>30</sup>

*C. The ESA's Citizen-Suit Provision Empowers Citizens to Compel the Service to Perform Non-Discretionary Duties*

The ESA includes a citizen-suit provision<sup>31</sup> that gives standing to any person<sup>32</sup> who seeks injunctive relief for violations or potential violations of the ESA.<sup>33</sup> The provision allows private citizens to file a claim in federal court to force the Service "to perform any act or duty under

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24. *Id.* § 1533(c)(2).

25. *Id.* § 1533(a)(3)(A).

26. 50 C.F.R. § 424.12(a)(1) (2006). The construction of the "not prudent" exception to the Secretary's duty to designate critical habitat are beyond the scope of this Comment.

27. 16 U.S.C. § 1533(b)(6)(A), (C)(ii).

28. 50 C.F.R. § 424.12(a)(2).

29. 16 U.S.C. § 1533(b)(6)(C)(ii).

30. *Id.*

31. *Id.* § 1540(g).

32. A "person" is defined in 16 U.S.C. § 1532(13) as "an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States."

33. 16 U.S.C. § 1540(g)(1). Though *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), later limited standing, the Supreme Court has noted that the *Lujan* requirements do not present a major obstacle for citizen suits. See *Bennett v. Spear*, 520 U.S. 154, 163–64 (1997) (commenting on the "remarkable breadth" of the ESA's citizen-suit provision in granting standing to interested parties).

section 1533 of this title which is not discretionary with [the Service].”<sup>34</sup> The Service’s duty to list critical habitat for endangered and threatened species falls under § 1533,<sup>35</sup> and the citizen-suit provision, § 1540(g), is the sole legal mechanism for enforcing this duty.<sup>36</sup> The ESA does not include its own statute of limitations, which means citizen suits are subject to the general six-year time-bar on suits against the United States government.<sup>37</sup>

## II. THE FEDERAL STATUTE OF LIMITATIONS PREVENTS PARTIES FROM BRINGING STALE CLAIMS AGAINST THE GOVERNMENT

A six-year statute of limitations, 28 U.S.C. § 2401, applies to civil actions against the federal government,<sup>38</sup> unless otherwise specified within a particular piece of legislation. This statute protects the government from the typical problems associated with stale claims: lost evidence, faded memories, and witnesses that disappeared long ago.<sup>39</sup> Additionally, § 2401 limits the scope of the federal government’s waiver of sovereign immunity.<sup>40</sup>

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34. See 16 U.S.C. § 1540(g)(1)(C).

35. See *id.* § 1533(b)(6)(C).

36. See *Bennett*, 520 U.S. at 161–75; *S. Appalachian Biodiversity Proj. v. U.S. Fish & Wildlife Serv.*, 181 F. Supp. 2d 883, 887 (E.D. Tenn. 2001) (explaining that if the Secretary does not designate critical habitat within the time allowed and a citizen suit cannot go forward, “then *no one* may compel the Service to do so.”). Plaintiffs have tried to bring suit under the Administrative Procedure Act (APA), 5 U.S.C. § 706 (2000), but courts have held that § 1540(g) precludes suits under the APA. See, e.g., *Haw. County Green Party v. Clinton*, 124 F. Supp. 2d 1173, 1193 (D. Haw. 2000) (“[I]f there is a remedy under the ESA, then action under the APA is not allowable.”); *Am. Canoe Ass’n Inc., v. U.S. Envtl. Protection Agency*, 30 F. Supp. 2d 908, 927 (E.D. Va. 1998) (“[T]he APA does not provide an avenue for duplicative review when a statute specifically sets out procedures for a review of agency action . . .”).

37. 28 U.S.C. § 2401(a) (2000).

38. *Id.* § 2401.

39. See Note, *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185–86 (1950).

40. See *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 686 (1983) (noting that the doctrine of strict construal means that waiver of immunity must not be “enlarged beyond what the language requires.”); *Spannaus v. Dep’t of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987) (“[U]nlike an ordinary statute of limitations, § 2401(a) is a jurisdictional condition attached to the government’s waiver of sovereign immunity, and as such must be strictly construed.”).

A. *Statutes of Limitations Protect Defendants from Stale Claims*

Statutes of limitations “are found and approved in all systems of enlightened jurisprudence.”<sup>41</sup> They have been part of the American system of law since the beginning of the Republic. In *Adams v. Woods*,<sup>42</sup> for example, the Supreme Court said that it “would be utterly repugnant to the genius of our laws” if cases could be “brought at any distance of time.”<sup>43</sup>

Generally, three main rationales for statutes of limitations have been recognized: disposing of stale claims, protecting defendants from fraudulent claims, and providing repose to defendants.<sup>44</sup> First, statutes of limitations protect defendants from claims that would be difficult to defend because of the passage of time.<sup>45</sup> They promote justice by preventing unfair surprise caused by claims that have been allowed to lie dormant until memories fade and evidence is lost.<sup>46</sup> Second, they promote social stability by protecting a long-existing status quo, and represent a legislative judgment that it is unjust for defendants to be sued over stale claims.<sup>47</sup> Finally, statutes of limitations address the suspicion that stale claims simply lack merit to begin with.<sup>48</sup> The Supreme Court has recognized that statutes of limitations sometimes create inequitable results, but the benefits of certainty and repose outweigh the costs: “Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles . . . . They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay.”<sup>49</sup>

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41. *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)).

42. 6 U.S. 336 (1805) (Marshall, C.J.).

43. *Id.* at 342.

44. See James R. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine As Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 VA. ENVTL. L.J. 589, 591–92 (1996); *Ledbetter v. Goodyear Tire & Rubber Co.*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 2162, 2170 (2007) (“Statutes of limitations serve a policy of repose.”) (citing *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554–55 (1974)).

45. *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965).

46. *Id.*

47. See *Ledbetter*, 127 S. Ct. at 2170.

48. *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. 386, 390 (1868) (“[Statutes of limitations] are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity . . . .”).

49. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).



*B. The Statute of Limitations for Claims Against the United States Represents a Waiver of the Government's Sovereign Immunity*

The general federal statute of limitations, 28 U.S.C. § 2401, provides that “every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.”<sup>50</sup> The moment of accrual is determined by reference to the substantive law.<sup>51</sup> When the last element of any cause of action occurs, the statute of limitations begins to run.<sup>52</sup>

The § 2401 statute of limitations, a waiver of the federal government's sovereign immunity, is typically strictly construed. Sovereign immunity means “the United States may not be sued without its consent.”<sup>53</sup> A lack of governmental consent is a fundamental defect that deprives the court of jurisdiction.<sup>54</sup> This principle of sovereign immunity has its roots in English law. It is based on the belief that the King, the ultimate source of all authority by divine right, could do no wrong.<sup>55</sup> While the Constitution does not guarantee the federal government sovereign immunity, the Supreme Court has referred to it since the early years of the Republic.<sup>56</sup>

Jurisdictional statutes of limitations, such as the six-year statute of limitations for actions brought against the government,<sup>57</sup> operate as a waiver of sovereign immunity.<sup>58</sup> As such, courts have generally limited

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50. 28 U.S.C. § 2401(a) (2000). If the plaintiff is under legal disability or in a foreign jurisdiction at the time a claim accrues, the action may be commenced within three years after the disability ceases. *Id.*

51. Note, *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1200 (1950).

52. *See id.*

53. *United States v. Mitchell*, 463 U.S. 206, 212 (1983).

54. *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (“[T]he United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.”) (internal citations omitted).

55. WILLIAM BLACKSTONE, 1 COMMENTARIES, \*238, \*246. Many of America's most prominent and influential political thinkers argued that the new republican government should enjoy the same immunity. *See, e.g.*, THE FEDERALIST NO. 81, at 567 (Alexander Hamilton) (Charles Scribner's Sons ed., 1897) (“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.”).

56. *See, e.g.* *Cohens v. State of Virginia*, 19 U.S. 264, 303 (1821) (Marshall, C.J.) (stating, in dictum, “[i]t is an axiom in politics, that a sovereign and independent State is not liable to the suit of any individual, nor amenable to any judicial power, without its own consent.”); *United States v. Clarke*, 33 U.S. 436, 444 (1834) (Marshall, C.J.) (stating, in dictum, “the United States are not suable of common right . . .”).

57. 28 U.S.C. § 2401 (2000).

58. *See Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 592 (9th Cir. 1990) (“The

the scope of the government's waiver by strictly construing the statute of limitations.<sup>59</sup> This doctrine of strict construal means that waiver of immunity must not be "enlarged beyond what the language requires."<sup>60</sup> The Supreme Court has stated that courts will not infer a waiver from legislative history or congressional policy purposes. Rather, the waiver must be explicit in the statutory text.<sup>61</sup> If the statute expressly waives the government's immunity, "[a court's] task is to discern the unequivocally expressed intent of Congress, construing ambiguities in favor of immunity."<sup>62</sup> The § 2401 statute of limitations limits the scope of a waiver of sovereign immunity. Therefore, courts interpret the statute of limitations narrowly.<sup>63</sup>

### III. IF A VIOLATION IS CONTINUOUS OR RECURRING, COURTS HAVE TOLLED THE STATUTE OF LIMITATIONS

Courts have applied the continuing-violation theory and the series-of-discrete-violations theory to toll statutes of limitations. Under the continuing-violation theory, courts toll the statute of limitations for civil wrongs that occur within the statutory time period, even if they *began* before the statutory time period.<sup>64</sup> Similarly, under the series-of-discrete violations theory, the court tolls the statute of limitations when the defendant repeats the same misbehavior so frequently that it makes more sense to aggregate the separate incidents and treat them as a single incident, even if some occurred outside the time limit of the statute of

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doctrine of sovereign immunity precludes suit against the United States without the consent of Congress; the terms of its consent define the extent of the court's jurisdiction. The applicable statute of limitations is a term of consent. [A] plaintiff's failure to sue within the period of limitations is not simply a waivable defense; it deprives the court of the jurisdiction to entertain the action.") (internal citations omitted).

59. See *Soriano v. United States*, 352 U.S. 270, 276 (1957) ("[T]his Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied."); *Spannaus v. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987) (finding that because § 2401 is a jurisdictional statute, it must be strictly construed).

60. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 686 (1983) (internal ellipsis omitted).

61. *Lane v. Pena*, 518 U.S. 187, 192 (1996).

62. *United States v. Williams*, 514 U.S. 527, 531 (1995) (internal quotation omitted).

63. See *Spannaus*, 824 F.2d at 55 ("[U]nlike an ordinary statute of limitations, § 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed.").

64. See Kyle Graham, *The Continuing Violations Doctrine*, 43 GONZ. L. REV. 271, 273–74 (2008).

limitations.<sup>65</sup> The similarity of, and overlap between, these two doctrines has confused courts for years, leading them to adopt different and conflicting tests in determining when, if, and how to toll the statute of limitations.<sup>66</sup>

A. *Courts Sometimes Use the Continuing-Violation Theory to Toll the Statute of Limitations When a Wrongdoer Fails to Cure Ongoing Misbehavior*

When defendants begin their misconduct outside of the statutory filing period, but persist in the same violation until a time that falls within the filing period, courts sometimes apply the continuing-violation doctrine.<sup>67</sup> Courts have applied this doctrine in many different contexts, including civil rights, trespass, nuisance, employment discrimination, antitrust and environmental claims.<sup>68</sup>

The Supreme Court applied the continuing-violation doctrine in the civil-rights context in *National Railroad Passenger Corp. v. Morgan*.<sup>69</sup> Abner Morgan, a black man, started working for Amtrak in August 1990.<sup>70</sup> He endured a series of racially demeaning incidents, including being assigned menial tasks unrelated to his job as an electrician.<sup>71</sup> His supervisor made a final racist comment in March 1995, and Morgan was fired soon after.<sup>72</sup> Morgan filed a claim under Title VII of the 1964 Civil Rights Act,<sup>73</sup> seeking relief for Amtrak's discriminatory acts and the hostile work environment he endured.<sup>74</sup> Under Title VII, an aggrieved party must file a claim "within three hundred days after the alleged unlawful employment practice occurred."<sup>75</sup>

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65. *Id.* at 272–74.

66. *Id.* at 273.

67. See *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115–19 (2002); *Held v. Gulf Oil*, 684 F.2d 427, 430–31 (6th Cir. 1982) (characterizing constant sex discrimination as a continuing violation); *Acme Print Ink, Co. v. Menard, Inc.*, 812 F. Supp. 1498 (E.D. Wis. 1992) (holding that continuous leaking of a hazardous substance from a former landfill in violation of the Resource Conservation and Recovery Act was a continuing violation).

68. See Kyle Graham, *The Continuing Violations Doctrine*, 43 GONZ. L. REV. 271, 273–74 (2008).

69. 536 U.S. 101 (2002).

70. *Id.* at 115–19.

71. *Id.* at 106 n.1.

72. *Id.* at 115 n.8.

73. 42 U.S.C. §§ 2000e–2000h (2000).

74. *Morgan*, 536 U.S. at 105–06.

75. *Id.* at 122–23. The statute contains two statutes of limitations: 180 days and 300 days. 42 U.S.C. § 2000e-5(e)(1). It provides that such a claim must be filed (1) within 180 days after the

The Supreme Court held that Morgan could recover only for the discrete incidents of discrimination that had occurred at some point during the previous three hundred days.<sup>76</sup> But the Court further held that he could recover for the entire five years of hostile work environment he had suffered.<sup>77</sup> The Court based its decision on the different natures of the respective “unlawful employment practice[s],” and when each one had “occurred.”<sup>78</sup> The Court characterized each separate incident of discrimination as a discrete, actionable event that started its own statute of limitations,<sup>79</sup> and found that “Morgan can only file a charge to cover discrete acts that ‘occurred’ within the appropriate time period.”<sup>80</sup> The nature of a hostile-workplace offense is very different, the Court said, because it does not occur on any particular day. It sometimes occurs over a series of years.<sup>81</sup> Though the claim is composed of a series of separate acts, collectively it constitutes “one unlawful employment practice.”<sup>82</sup> Because Morgan had filed suit within three hundred days of the last time a hostile work environment had “occurred,” the statute of limitations did not time-bar his claim.<sup>83</sup> In fact, the Supreme Court directed the trial court to consider the entire five-year violation when calculating liability.<sup>84</sup>

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alleged unlawful employment practice occurred; or (2) within 300 days after such occurrence, if the person aggrieved initially instituted discrimination proceedings with a state or local agency.

76. *Morgan*, 536 U.S. at 110–15.

77. *Id.* at 115–19.

78. 42 U.S.C. § 2000e-5(e)(1).

79. *Morgan*, 536 U.S. at 110.

80. *Id.* at 114.

81. *Id.* at 115 (“[T]he ‘unlawful employment practice’ therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.”).

82. *Id.* at 117 (quoting 42 U.S.C. § 2000e-5(e)(1)).

83. *Id.*

84. *Id.* (“The timely filing provision only requires that a Title VII plaintiff file a charge within a certain number of days after the unlawful practice happened. It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be used by a court for the purposes of determining liability.”).

*B. Courts Have Applied the Series-of-Discrete-Violations Theory to Toll the Statute of Limitations When a Wrongdoer Repeatedly Offends*

Courts sometimes apply the series-of-discrete-violations theory when a wrongdoer persists in repeating violations of an identical nature.<sup>85</sup> The clock starts anew with each discrete violation.<sup>86</sup> When adopting this approach, courts are careful to ensure that the plaintiff is suffering from a new incident of wrongdoing, and not from present consequences that flow from a one-time, past violation.<sup>87</sup> The Eleventh Circuit utilized this “series of discrete violations” theory in *Knight v. Columbus*.<sup>88</sup> Firefighters from Columbus, Georgia filed suit against their city in 1992, alleging Columbus had violated the Fair Labor Standards Act (FLSA)<sup>89</sup> by refusing to pay overtime.<sup>90</sup> The FLSA barred any claim unless it was “commenced within two years after the cause of action accrued.”<sup>91</sup> The City had adopted the classification system at issue in 1985, well outside the statutory filing period.<sup>92</sup> The district court granted the City’s motion for summary judgment, finding that the statute of limitations time-barred the firefighters’ claims.<sup>93</sup>

The Eleventh Circuit Court of Appeals reversed, allowing the firefighters’ claim to proceed. The court held that each paycheck without overtime “constitute[d] a *new* violation of the FLSA.”<sup>94</sup> The court took great care to distinguish the firefighters’ theory from the type of continuing violation at issue in *Morgan*.<sup>95</sup> “The term ‘continuing violation’ suggests that the original violation, namely the decision to classify overtime-eligible employees as exempt, is somehow the source of the employees’ present ability to recover. It is not.”<sup>96</sup> The court was

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85. See, e.g., *Knight v. Columbus*, 19 F.3d 579, 582 (11th Cir. 1994) (holding that each paycheck constituted a new violation of the Fair Labor Standards Act); *Gibbons v. Auburn Univ.*, 108 F. Supp.2d 1311, 1317 (M.D. Ala. 2000) (holding that each instance in which an employee receives an unequal paycheck based on race constitutes a repeated, discrete violation).

86. See *Knight*, 19 F.3d at 582.

87. See *Calloway v. Partners Nat’l Health Plans*, 986 F.2d 446, 448 (11th Cir. 1993).

88. 19 F.3d 579 (11th Cir. 1994).

89. 29 U.S.C. §§ 201–19 (2000).

90. *Knight*, 19 F.3d at 580.

91. *Id.* at 581 (quoting 29 U.S.C. § 255(a) (1985)).

92. *Id.* at 580.

93. *Id.*

94. *Id.* at 581.

95. *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

96. *Knight*, 19 F.3d at 582.

not concerned with when, exactly, the City had misclassified the employees—the only relevant fact was that the firefighters had received defective paychecks at some point during the statute-of-limitations window.<sup>97</sup> Instead of a continuous failure to pay, the court recognized that this case involved a “series of repeated violations of an identical nature,” each one giving “rise to a new cause of action.”<sup>98</sup> Because of the court’s decision to characterize the firefighters’ claim as a series of discrete violations, each of which started its own filing period, the firefighters were able to recover only for paychecks they had received during the previous two years.<sup>99</sup>

*C. Courts Have Applied the Continuing-Violation Doctrine in a Different Environmental Context*

Courts have applied the continuing-violation doctrine to violations of the Clean Water Act (CWA).<sup>100</sup> In *Natural Resources Defense Council v. Fox*,<sup>101</sup> the District Court for the Southern District of New York held that the statute of limitations did not apply to a claim in which the plaintiff alleged that the Environmental Protection Agency (EPA) failed to issue certain water-quality regulations.<sup>102</sup> As early as 1979, the State of New York was obligated to propose Total Maximum Daily Loads (TMDLs) for various polluted waters to the EPA.<sup>103</sup> New York never submitted a proposal, and courts treat such an omission as a constructive submission of zero TMDLs.<sup>104</sup> The EPA failed to review that constructive submission and failed to issue the appropriate regulations.<sup>105</sup>

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97. *Id.*

98. *Id.*

99. *Id.*

100. 33 U.S.C. §§ 1251–1387 (2000) (enacted in 1972 as amendments to the Water Quality Act of 1965). *See, e.g.*, *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1010 (11th Cir. 2004) (holding that failure to obtain permit was a continuing violation of the CWA); *American Canoe Ass’n v. United States EPA*, 30 F. Supp. 2d 908, 925 (D. Va. 1998) (concluding that a government agency’s failure to perform a nondiscretionary action “is better understood as a continuing violation, which plaintiffs may challenge at any time provided the delay continues,” and characterizing the “application of a statute of limitations to a claim of unreasonable delay [as] grossly inappropriate.”).

101. 909 F. Supp. 153 (S.D.N.Y. 1995).

102. *Id.* at 159–60.

103. *Id.* at 156–57.

104. *Id.* at 157.

105. *Id.*

The plaintiff, an environmental non-profit organization, brought a CWA citizen suit<sup>106</sup> in 1995 for a failure that first occurred in 1979.<sup>107</sup> The court refused to apply the general federal statute of limitations.<sup>108</sup> The court grounded its decision first in public policy, pointing out that the citizen suit was the only mechanism for forcing the EPA to act: “[T]he recourse for enforcing the mandatory duty established by Congress is the citizen suit . . . . The practical effect of imposing a statute of limitations in a suit such as this is to repeal the mandatory duties established by Congress . . . .”<sup>109</sup> The court held, in the alternative, that the violation was a continuing one: “[T]he continued failure of a state to establish TMDLs creates a continuing duty of the Administrator to disapprove of the state’s actions and to promulgate TMDLs.”<sup>110</sup>

#### IV. COURTS HAVE APPLIED THE FEDERAL STATUTE OF LIMITATIONS INCONSISTENTLY TO ESA CITIZEN SUITS

Courts have split on how the Service’s failure to designate critical habitat for endangered and threatened species within one year of issuing a “not determinable” finding interacts with the six-year statute of limitations under § 2401. The Eleventh Circuit held that the failure is a one-time violation that time-barred a suit brought twelve years after the Service first listed two species of minnows as endangered.<sup>111</sup> Federal district courts in Tennessee and Louisiana called the Service’s failure a continuing violation, and tolled the statute’s time period.<sup>112</sup> The District Court of Oregon reached substantially the same result as the Tennessee and Louisiana district courts, but characterized the Service’s failure as a series of discrete violations.<sup>113</sup>

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106. See 33 U.S.C. § 1365(a)(2) (“Any person may commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.”).

107. *Natural Res. Def. Council v. Fox*, 909 F. Supp. 153, 156 (S.D.N.Y. 1995).

108. *Id.* at 159–60 (refusing to apply 28 U.S.C. § 2401 or any other statute of limitations to the claim).

109. *Id.* at 159.

110. *Id.* at 160.

111. *Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1335 (11th Cir. 2006).

112. *Schoeffler v. Kempthorne*, 493 F. Supp. 2d 805, 820–21 (W.D. La. 2007); *S. Appalachian Biodiversity Proj. v. U.S. Fish & Wildlife Serv.*, 181 F. Supp. 2d 883, 887 (E.D. Tenn. 2001).

113. *Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv.*, No. 3:07CV00358, 2007 WL 4117978, at \*5–6 (D. Or. Nov. 16, 2007).

A. *The Eleventh Circuit Treated the Secretary's Failure to Designate Critical Habitat As a One-Time Violation Time-Barred by the Statute of Limitations*

In 2004, the Center for Biological Diversity brought a citizen suit, *Center for Biological Diversity v. Hamilton*,<sup>114</sup> to compel the Service to designate critical habitat for two species of minnow, the Blue Shiner and the Goldline Darter. In 1992, when the Service listed the two species as endangered, it concluded that their critical habitat was not determinable.<sup>115</sup> The Service did not designate habitat during the next twelve years, and conceded its failure to do so before the court.<sup>116</sup> The District Court for the Northern District of Georgia held that the Service's failure to designate critical habitat occurred one year after it listed the fish as endangered in 1992, and that the violation ended that same day.<sup>117</sup> Because the Center did not bring suit within the next six years, the federal statute of limitations barred its claim.<sup>118</sup>

The Court of Appeals for the Eleventh Circuit affirmed.<sup>119</sup> The court focused on two different clauses of 16 U.S.C. § 1533(b)(6)(C)(ii),<sup>120</sup> the subsection that requires the Service to list critical habitat "not later than" the close of one year after issuing a "not determinable" finding.<sup>121</sup> First, the court reasoned that the language "not later than" creates a fixed point in time at which the Service's violation arises.<sup>122</sup> That moment starts the clock running on the statute of limitations. Second, the court found additional textual support in the ESA's requirement that the Service rely on "such data as may be available *at the time* [sic]"<sup>123</sup> when it ultimately

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114. 385 F. Supp. 2d 1330 (N.D. Ga. 2005), *aff'd*, 453 F.3d 1331 (11th Cir. 2006).

115. *Id.* at 1335.

116. *Id.* at 1332.

117. *Id.* at 1336 ("Because the ESA . . . imposed no continuing duty on Defendants regarding [critical-habitat] designation, there is no continuing violation.").

118. *Id.* at 1336–37.

119. *Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331 (11th Cir. 2006).

120. 16 U.S.C. § 1533(b)(6)(C)(ii) ("[If the] critical habitat of such species is not then determinable, . . . the Secretary . . . may extend the one-year period . . . by not more than one additional year, but *not later than* the close of such additional year the Secretary must publish a final regulation, *based on such data as may be available at that time*, designating, to the maximum extent prudent, such habitat." (emphases added)).

121. *Hamilton*, 453 F.3d at 1335.

122. *Id.*

123. *Id.* at 1335. The court misquoted the statute during its textual analysis; the statute actually reads, "at *that time*." 16 U.S.C. § 1533(b)(6)(C)(ii) (emphasis added). The change does not seem to have affected the court's analysis.



designates habitat. The Service's one-year period for studying the minnows' habitats expired in 1993, and the plaintiffs filed suit in 2006. The court argued that the ESA would require the Service to use only data from 1993 to designate the fishes' habitats in 2006: "If the duty were ongoing, it would be anomalous for Congress to require the Secretary to ignore new information when promulgating the rule."<sup>124</sup>

The court also grounded its decision in the justifications for the continuing-violation doctrine and principles of sovereign immunity. Noting that the Eleventh Circuit applies the continuing-violation doctrine only to situations "in which a reasonably prudent plaintiff would have been unable to determine that a violation had occurred,"<sup>125</sup> the court concluded that a reasonably prudent plaintiff in the Center's position situation would have known about the Service's failure to designate critical habitat for the minnows the day following the deadline.<sup>126</sup> Finally, the court interpreted the § 2401 statute of limitations narrowly, explaining, "[t]he terms upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied."<sup>127</sup>

*B. Several District Courts Have Tolloed the Statute of Limitations in Cases with Facts Similar to Those in Hamilton*

Three federal district courts have held that the statute of limitations does not bar citizen suits that seek to force the Service to list critical habitat for threatened and endangered species. Two courts treated the Service's failure as a single, continuous violation.<sup>128</sup> Another court held that each day the Secretary failed to designate critical habitat was a discrete violation.<sup>129</sup> In all three cases, the courts tolled the statute of limitations and ordered the Service to designate habitat for threatened and endangered species.

Four years before the Eleventh Circuit decided *Hamilton*, a magistrate judge for the Eastern District of Tennessee faced a similar set of relevant

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124. *Hamilton*, 453 F.3d at 1335.

125. *Id.*

126. *Id.*

127. *Id.* (quoting *Soriano v. United States*, 352 U.S. 270, 276 (1957)) (internal markings omitted).

128. *Schoeffler v. Kempthorne*, 493 F. Supp. 2d 805, 820–21 (W.D. La. 2007); *S. Appalachian Biodiversity Proj. v. U.S. Fish & Wildlife Serv.*, 181 F. Supp. 2d 883, 887 (E.D. Tenn. 2001).

129. *Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv.*, No. 3:07CV00358, 2007 WL 4117978, at \*5–6 (D. Or. Nov. 16, 2007).

facts and reached the opposite conclusion.<sup>130</sup> In 2001, the Southern Appalachian Biodiversity Project filed suit, asking that the court enjoin the Service to designate critical habitat for nine species of mollusks. The Service listed the different species as either threatened or endangered in 1993, and issued a “not determinable” habitat finding for each.<sup>131</sup>

The Biodiversity Project argued that the statute of limitations had not started to run because the Service had never acted—that its “*continuing nonfeasance*” was like a “continuing tort or continuing nuisance.”<sup>132</sup> The Service argued that the statute of limitations had started to run one year and one day after it listed the mollusks as threatened or endangered species.<sup>133</sup> The Service argued that it would not be proper to interpret that discrete event as a “continuing violation that would hold the statute of limitations in abeyance for time in memorial . . . despite no indication from Congress that it wished this to be the case.”<sup>134</sup> The court disagreed with the assertion that Congress had wanted the statute of limitations to expire: “Respectfully, the non-repeal of 16 U.S.C. § 1533(B)(6)(C), which unequivocally directs the Service to designate critical habitat within one year of listing a species as endangered, must be presumed to be an indication of Congress’s wishes.”<sup>135</sup>

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130. *S. Appalachian*, 181 F. Supp. 2d at 883. The District Court for the Northern District of Georgia took note of *Southern Appalachian* while deciding *Hamilton*, and erroneously distinguished its facts. *See Hamilton*, 385 F. Supp. 2d at 1335 (“[I]n the Tennessee action, [the Service] had not designated a critical habitat because it was not ‘prudent’ to do so. In this case, critical habitat was not designated because such habitat was not ‘determinable’ at the time.”). The Center for Biological Diversity pointed out the error and moved for reconsideration pursuant to FED. R. CIV. P. 59(e). *See Plaintiff’s Motion for Reconsideration at 4–8, Ctr. for Biological Diversity v. Hamilton*, 385 F. Supp. 2d 1330 (N.D. Ga. 2005) (No. 1:04CV02573), *available at* <http://www.law.washington.edu/wlr/notes/83washlrev403n130.pdf>. The court did not acknowledge the error in its order denying reconsideration. *See Hamilton*, 385 F. Supp. 2d at 1337–39.

131. *S. Appalachian*, 181 F. Supp. 2d at 884–85. The Secretary had issued a not-*prudent* finding for seven other species of mollusks. The Service admitted it had not used the right criteria in reaching the not-*prudent* finding, and asked the court for a “voluntary remand” to correct the error. *Id.* The court gave the Service several different deadlines, between eighteen and twenty-four months away, to propose a prudency rule to the Federal Register for each of the seven species. The court was not happy with the outcome: “The Court frankly states that it feels that it has been forced to be an unwilling accessory to a violation of the law, but the circumstances leave no alternative.” *Id.* at 888. As noted previously, *supra* note 26, the consequences of a not-*prudent* finding are beyond the scope of this Comment.

132. *S. Appalachian*, 181 F. Supp. 2d at 887 (emphasis in original).

133. *Id.*

134. Supplemental Letter Brief at 2, *S. Appalachian Biodiversity Proj. v. U.S. Fish & Wildlife Serv.*, 181 F. Supp. 2d 883, 887 (E.D. Tenn. 2001) (No. 2:00CV00361), *available at* <http://www.law.washington.edu/wlr/notes/83washlrev403n134.pdf>.

135. *Id.* Congressional non-action might indicate a contrary intent. The court noted, “In all fairness, it also could be argued that the failure of Congress to provide sufficient funding to the

The court rejected the Service's argument that the violation was a discrete event, but did not explain precisely how it understood the statute of limitations to operate. The court characterized the Service's inaction as a continuing violation, but did not explain precisely how the continuing-violation doctrine functions: "The statute of limitations commences to run anew each and every day that the Service does not fulfill the affirmative duty required of it. In short, the statute of limitations has never commenced to run."<sup>136</sup>

In *Schoeffler v. Kempthorne*,<sup>137</sup> a group of plaintiffs asked the District Court for the Western District of Louisiana to order the Service to designate critical habitat for the Louisiana black bear. The bear's historic habitat included eastern Texas, southern Mississippi, southern Arkansas, and all of Louisiana.<sup>138</sup> The bear's population had significantly declined by the early 1900s because of market hunting and habitat loss.<sup>139</sup> Schoeffler and the other plaintiffs had petitioned the Service to list the black bear as threatened in 1987.<sup>140</sup> The Service issued some ambiguous findings<sup>141</sup> and took a few half-steps toward a conclusion,<sup>142</sup> but it did not list the black bear as threatened until 1992, three weeks after an advocacy group filed a citizen suit to force it to do just that.<sup>143</sup> The Service issued a "not determinable" finding for the black bear's habitat the same day it listed the animal as threatened.<sup>144</sup> Over the next twelve

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Service is a manifestation of an intent that the Endangered Species Act should be allowed to languish." *Id.* at 887 n.13.

136. *Id.* at 887.

137. 493 F. Supp. 2d 805 (W.D. La. 2007).

138. Daniel Miller et al., *Genetic Variation in Black Bear Populations From Louisiana and Arkansas: Examining the Potential Influence of Reintroductions From Minnesota*, 10 URSUS 335, 335 (1998).

139. *Id.*

140. *Schoeffler*, 493 F. Supp. 2d at 810–11.

141. See Notice of Findings on Petitions to List the Louisiana Black Bear, Lower Keys Marsh Rabbit, and Sherman's Fox Squirrel, 53 Fed. Reg. 31,723 (Aug. 19, 1988) (to be codified at 50 C.F.R. pt. 17) (announcing that listing the black bear as threatened is "warranted but precluded by other actions to amend the lists").

142. See Proposed Threatened Status for the Louisiana Black Bear, Proposed Designation of Threatened by Similarity of Appearance of all Bears of the Species *Ursus americanus* Within the Historic Range of *U. a. luteolus*, 55 Fed. Reg. 25,341 (proposed June 21, 1990) (to be codified at 50 C.F.R. pt. 17).

143. *Defenders of Wildlife v. Lujan*, 1992 WL 124796 (E.D. La. 1992) (No. 2:91CV04641) (minute entry).

144. *Schoeffler*, 493 F. Supp. 2d at 810.

years, the Service took a few tentative steps<sup>145</sup> toward listing the bear's critical habitat, but never issued a regulation.<sup>146</sup>

In 2005, Schoeffler and others filed a claim against the Service, asking the court to force the Service to list critical habitat for the Louisiana black bear.<sup>147</sup> The Service moved for summary judgment, arguing that the statute of limitations had run. The court held that the plaintiffs were never on notice that their right of action had accrued, because the Service had never done anything that would have given them actual or constructive notice that they had a right of action.<sup>148</sup> The plaintiffs had negotiated with the Service for years, hoping to reach a resolution on the animal's critical habitat. Under those circumstances, said the court, there was nothing to suggest that the Service's ongoing failure to list habitat "should be perceived as adverse action, rather than bureaucratic bungling or foot dragging."<sup>149</sup>

In the alternative, the court held that the continuing-violation doctrine had tolled the statute of limitations.<sup>150</sup> The court defined the continuing-violation doctrine as embracing two types of cases.<sup>151</sup> First, it described a situation similar to the one in *National Railroad Passenger Corp. v. Morgan*,<sup>152</sup> where "the original violation occurred outside the statute of limitations, but is closely related to other violations that are not time-barred. In such cases, recovery may be had for all violations, on the theory that they are part of one, continuing violation."<sup>153</sup> The court then described a situation like the one in *Knight v. Columbus*,<sup>154</sup> where "an initial violation, outside the statute of limitations, is repeated later."<sup>155</sup> In

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145. See Proposed Designation of Critical Habitat for the Louisiana Black Bear, 58 Fed. Reg. 63,560 (proposed Dec. 2, 1993) (to be codified at 50 C.F.R. pt. 17) (proposing to determine the Louisiana black bear's critical habitat and opening a ninety-day period for public comment); Reopening of Comment Period and Public Hearing on Proposed Designation of Critical Habitat for the Louisiana Black Bear, 59 Fed. Reg. 10,607 (proposed March 7, 1994) (to be codified at 50 C.F.R. pt. 17) (outlining proposed areas and reopening the period for public comment).

146. *Schoeffler*, 493 F. Supp. 2d at 811.

147. *Id.*

148. *Id.* at 816.

149. *Id.*

150. *Id.* at 817 ("The Court will . . . address plaintiffs' alternative assertion [that the Service's failure was a continuing violation], finding, therefore holding that had defendant prevailed on the issue of the accrual of the statute of limitations, this Court would continue to retain jurisdiction to resolve the issues between the parties to this litigation.").

151. *Id.* at 819.

152. 536 U.S. 101 (2002).

153. *Schoeffler*, 493 F. Supp. 2d at 819.

154. 19 F.3d 579 (11th Cir. 1994).

155. *Schoeffler*, 493 F. Supp. 2d at 819.

such situations, the court said, “each violation begins the limitations period anew, and recovery may be had for at least those violations that occurred within the period of limitations.”<sup>156</sup> The court described the Service’s failure to comply with its mandatory duty as falling within the former category.<sup>157</sup>

In a 2007 case, *Institute for Wildlife Protection v. Fish & Wildlife Service*,<sup>158</sup> the District Court for the District of Oregon tolled the statute of limitations under similar facts.<sup>159</sup> The Institute for Wildlife Protection asked the court to enjoin the Service to designate critical habitat for the Oregon chub, a small fish endemic to the state.<sup>160</sup> In 1993, chub populations occupied only two percent of the fish’s historic range.<sup>161</sup> Chemical spills, dam construction, and non-native species of fish all threatened the remaining populations.<sup>162</sup> The Service listed the species as endangered in 1993.<sup>163</sup> Thirteen and one-half years later, when the Institute of Wildlife Protection filed suit, the Oregon chub was still without designated critical habitat.<sup>164</sup>

The case originally came before a magistrate judge who recommended that the court dismiss the claim as time-barred, relying on the Eleventh Circuit’s reasoning in *Hamilton*.<sup>165</sup> The court did not adopt the recommendation, instead applying the series-of-discrete-violations doctrine and holding that each day the Service failed to list critical habitat for the chub was a single, discrete violation.<sup>166</sup> The court based

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156. *Id.*

157. *Id.* at 820 (“[T]he Secretary’s duty under the law continues until the final regulation is published. Even if plaintiffs’ right of action accrued when the deadline passed on January 7, 1993, and the statute of limitations expired six years [sic], the Secretary’s violation is ongoing and does not constitute a discrete one-time violation with lingering effects or consequences.”).

158. *Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv.*, No. 3:07CV00358, 2007 WL 4117978 (D. Or. Nov. 16, 2007).

159. *Id.* at \*6.

160. *See* Determination of Endangered Status for the Oregon Chub, 58 Fed. Reg. 53,800, 53,800–01 (Oct. 18, 1993) (to be codified at 50 C.F.R. pt. 17).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv.*, No. 3:07CV00358, 2007 WL 4117978, at \*2 (D. Or. Nov. 16, 2007).

165. *Id.* at \*4. Though the magistrate judge ultimately followed the decision in *Hamilton*, he acknowledged the weight of the case law suggesting the violation was continuing. *See* *Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv.*, No. 3:07CV00358, 2007 WL 4118136 (D. Or. 2007).

166. *Inst. for Wildlife Prot.*, 2007 WL 4117978, at \*6. Like the *Schoeffler* court, the Oregon District Court had an alternative holding. In *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991), the Ninth Circuit held that the § 2401 statute of limitations did not apply to

its decision on the text of the ESA itself. It reasoned that because the ESA included several ongoing Service duties to threatened and endangered species, like periodic status reviews<sup>167</sup> and discretionary habitat revisions,<sup>168</sup> the Service's duty to designate critical habitat was also "an ongoing, binding statutory duty."<sup>169</sup> Having found a series of discrete violations, the court expressly declined to analyze the continuing-violation doctrine.<sup>170</sup>

The court also stated that time-barring the Institute's claim would not advance the underlying purposes of the federal statute of limitations—"avoiding stale claims, achieving finality, and protecting those who rely on the law."<sup>171</sup> The claim was not stale because the Service continued to study the chub, and had never taken any final action that would indicate the fish did not need critical habitat.<sup>172</sup> A judicial decision would promote finality, because it would eliminate the uncertainty inherent in agency inaction.<sup>173</sup> The Service's thirteen years of inaction had not created a reliance interest in the two parties or the public.<sup>174</sup> Finally, applying a statute of limitations to unreasonable agency delay was "grossly inappropriate, in that it would mean that [the Service] could immunize its allegedly unreasonable delay from judicial review simply by extending that delay for six years."<sup>175</sup>

In sum, federal courts have inconsistently applied the statute of limitations to the Service's failure to designate critical habitat for threatened or endangered species. In *Hamilton*, the Eleventh Circuit characterized the failure as a one-time, discrete violation that starts the clock running the first day the Service breaches its duty. Three district courts disagreed. The Eastern District of Tennessee and the District of Louisiana called the same failure a single, continuous violation. The

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claims alleging that a government agency acted outside its statutory or constitutional authority. The Oregon court noted that this rule applied to the Service's failure to list the chub's critical habitat: "The Court notes [the Service] does not have the discretion to ignore its statutory duty to designate critical habitat for the Oregon chub, and, therefore, [the Service's] 13 years of noncompliance with the ESA exceeds its statutory authority." *Inst. for Wildlife Prot.*, 2007 WL 4117978, at \*6.

167. *Inst. for Wildlife Prot.*, 2007 WL 4117978, at \*5 (citing 16 U.S.C. § 1533(c)(2) (2000)).

168. *Id.* (citing 16 U.S.C. § 1533(a)(3)(A)(ii) (2000)).

169. *Id.*

170. *Id.* at \*6.

171. *Id.* at \*5.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* (citing *Am. Canoe Ass'n v. U.S. Envtl. Prot. Agency*, 30 F. Supp. 2d 908, 925 (E.D. Va. 1998)) (internal markings omitted).

District of Oregon held that the Service's failure to designate critical habitat is best characterized as a series of discrete violations.

V. COURTS SHOULD CONSTRUE THE SERVICE'S FAILURE TO DESIGNATE CRITICAL HABITAT AS A CONTINUING VIOLATION

The overarching policy purpose of the ESA is the preservation of threatened and endangered species.<sup>176</sup> Courts should construe the Service's failure to designate critical habitat as a continuing violation. First, courts advance this goal by interpreting the Service's failure to designate critical habitat for those species as a continuing violation. Second, the ESA's text and context are consistent with such an approach, whereas the Eleventh Circuit's decision in *Hamilton* is inconsistent with the plain language and purpose of the ESA. Finally, the policy purposes underlying the federal statute of limitations do not justify its application to ESA critical-habitat cases.

A. *Courts Would Advance Congressional Intent by Interpreting the Service's Failure to Designate Critical Habitat as a Continuing Violation*

Congress intended to protect the critical habitat of all threatened and endangered species.<sup>177</sup> Courts further that goal when they interpret the Service's failure to act as a continuing violation. Such an interpretation is consistent with the Supreme Court's application of continuing-violation doctrine. In contrast, the Eleventh Circuit's interpretation that the violation was a discrete, one-time event is at odds with congressional intent.

1. *Both the Continuing-Violation Theory and the Series-of-Discrete-Violations Theory Further Congressional Intent and Purpose*

If the Service does not designate critical habitat within one year after issuing a "not determinable" finding, it violates a clear statutory mandate and undermines the central purpose of the ESA, which is protecting threatened and endangered species and their habitats.<sup>178</sup> The Service's

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176. See *supra* Part I.

177. See *supra* Part I.

178. 16 U.S.C. § 1533(b)(6).

failure means that a threatened or endangered species remains without the full array of protections Congress intended it to have, and the critical habitat upon which the species depends enjoys no codified protection at all. Federal agencies can take actions that threaten a species' habitat so long as the agencies do not jeopardize the continued existence of the species itself.<sup>179</sup> Because the Service has the duty to protect critical habitat for every listed species, and because those species remain without such protection until the Service acts, its failure does not end until it designates critical habitat.

The plight of the Oregon chub illustrates this danger. When the Service listed the fish as endangered in 1993, it detailed the dangers confronting the chub's habitat, which included chemical spills and chemical overflow from campground toilets.<sup>180</sup> The same problems confront the chub's habitat today, and its population continues to decline.<sup>181</sup> The Service's breach of duty is a continuing violation because of the ongoing nature of its failure to designate critical habitat.

The situation is analogous to the hostile work environment the plaintiff endured in *National Railroad Passenger Corp. v. Morgan*.<sup>182</sup> Morgan's claim arose when the employer's actions established a hostile work environment.<sup>183</sup> The statute of limitations did not start to run that day, however, because the hostile work environment continued throughout the next several years.<sup>184</sup> Yet the Court held that only if Amtrak had eliminated the racial hostility in Morgan's workplace would the statute of limitations have started to run.<sup>185</sup> For the chub, the reality of living without a critical-habitat designation arose on the day after the Service's deadline to designate critical habitat passed. The statute of

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179. *Id.* § 1536(a)(2).

180. *See* Determination of Endangered Status for the Oregon Chub, 58 Fed. Reg. 53,800 (Oct. 18, 1993) (to be codified at 50 C.F.R. pt. 17) ("These populations are threatened by . . . direct mortality from chemical spills from overturned truck or rail tankers, runoff or accidental spill of brush control and agricultural chemicals, and overflow from chemical toilets in campgrounds.").

181. *See* NatureServe Explorer: Oregonichthys crameri, <http://www.natureserve.org/explorer/servlet/NatureServe?searchName=Oregonichthys+crameri>, permanent copy available at <http://www.law.washington.edu/wlr/notes/83washrev403n181a.pdf>; United States Fish & Wildlife Service, Oregon Chub Fact Sheet, <http://www.fws.gov/oregonfwo/Species/Data/OregonChub>, permanent copy available at <http://www.law.washington.edu/wlr/notes/83washrev403n181b.pdf>.

182. 536 U.S. 101 (2002).

183. *See id.* at 115–16. The Court noted, however, that it might not be possible to identify the exact day on which the claim arose, as a hostile work environment might not be established by a single act. *Id.*

184. *See id.* at 115.

185. *See id.* at 118.



limitations did not start to run at that time, though, because the lack of critical-habitat designation continued. Just as the workplace racial hostility in *Morgan* was determined by the court to be a single, continuing violation that spanned across years, so too was the absence of critical-habitat protection with which the chub lived. Because the statute of limitations did not start to run, the Institute for Wildlife Protection was able to file a citizen suit and secure critical-habitat protections for the chub.<sup>186</sup> Such a result is consistent with Congress' intent that the Service protect the critical habitat of all threatened or endangered species, unless doing so would not be in the best interests of the species.

## 2. Courts Should Adopt the Continuing-Violation Theory

The continuing-violation theory is more consistent with the nature of the Service's violation than the series-of-discrete-violations theory. The series-of-discrete violations approach, as illustrated by the Oregon District Court decision in *Institute for Wildlife Protection*, yields an outcome that is consistent with congressional intent, but inaccurately describes the problem. In the context of the Oregon chub, the series-of-discrete violations approach implies that the Service affirmatively breaches its duty on repeated occasions. This is an accurate description of the case cited by the court—*Knight v. Columbus*<sup>187</sup>—but not of the Service's inaction. In *Knight*, the City took the affirmative step of issuing faulty paychecks before and during the filing period. Each paycheck represented a discrete violation of the relevant law, and the firefighters could recover for only those breaches that occurred within the filing window.<sup>188</sup> The series-of-discrete-violations theory did not accurately describe Service inaction, however. In contrast to *Knight*, the problem presented to the Oregon court was not that the Service breached its duty again and again, but that it never stopped violating the law in the first place.

Because the Service consistently violates its mandatory obligations when it fails to designate critical habitat, courts should characterize the failure as a continuing violation. As the Western District of Louisiana concluded in *Schoeffler v. Kempthorne*,<sup>189</sup> the Service's duty to designate critical habitat continues until the final regulation is published.

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186. *Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv.*, No. 3:07CV00358, 2007 WL 4117978, at \*5–6 (D. Or. Nov. 16, 2007).

187. 19 F.3d 579 (11th Cir. 1994).

188. *Id.* at 582.

189. 493 F. Supp. 2d 805 (W.D. La. 2007).

Thus, like the situation in *Morgan*, the violation begins outside of the limitations period and runs until the agency takes action to cure the violation. As such, the continuing-violation theory is more consistent with the nature of the Service's failure to designate critical habitat than the series-of-discrete-violations theory.

The result in *Center for Biological Diversity v. Hamilton*,<sup>190</sup> on the other hand, is fundamentally at odds with congressional intent behind mandating the designation of critical habitat. The Service listed the Goldline Darter and Blue Shiner minnows as threatened in 1992, and listed the dangers to their survival.<sup>191</sup> The problems included urbanization, water degradation, and pollution.<sup>192</sup> The minnows suffer from the same dangers today.<sup>193</sup> During the first six years the minnows struggled without critical habitat, a person could bring a citizen suit to force the Service to give the fish the protection Congress wanted them to have. Today, because of the *Hamilton* decision, there is no legal mechanism to force the Service to designate the minnows' critical habitat.<sup>194</sup> This is the case even though the reality faced by the minnows has not changed at all—extinction is just as likely today as it was in 1992. As a result of the approach adopted by the Eleventh Circuit, the Service managed to avoid its legal duty by delaying action for more than six years. This result contradicts Congress' purpose in enacting the ESA.

*B. The Plain Text and Context of the ESA Show That Congress Did Not Intend the Statute of Limitations to Time-Bar Citizen Suits*

Statutory interpretation starts with the language of the statute itself.<sup>195</sup> Courts look to the entire law and its object and policy when deciding the meaning of any particular provision, and should not let a single sentence

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190. 453 F.3d 1331 (11th Cir. 2006).

191. See Determination of Endangered Status for the Oregon Chub, 58 Fed. Reg. 53,800, 53,800–01 (Oct. 18, 1993) (to be codified at 50 C.F.R. pt. 17).

192. *Id.*

193. See United States Fish and Wildlife Service, Environmental Conservation Online System: Goldline Darter, [http://ecos.fws.gov/docs/life\\_histories/E05S.html](http://ecos.fws.gov/docs/life_histories/E05S.html) (last visited June 1, 2008), permanent copy available at <http://www.law.washington.edu/wlr/notes/83wlr403n193.pdf>.

194. See *S. Appalachian v. U.S. Fish & Wildlife Serv.*, 181 F. Supp. 2d 883, 887 (E.D. Tenn. 2001) (“If the Service’s failure to designate critical habitat is time-barred then *no one* may compel the Service to do so.”) (emphasis in original).

195. *Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987) (quoting *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

control interpretation.<sup>196</sup> Additionally, courts also avoid interpretations that would render a part of the statute superfluous.<sup>197</sup>

*1. Courts Would Undermine One of the ESA's Chief Enforcement Provisions If They Were to Time-Bar Citizen Suits*

The overarching policy purpose of the ESA is the protection of threatened and endangered species and the habitats on which they depend.<sup>198</sup> Congress made it clear that the Service's duty to designate critical habitat for threatened and endangered species is mandatory. The ESA provides that the Service "shall" designate critical habitat for threatened and endangered species concurrently with listing them.<sup>199</sup> The statute makes it just as clear that a "not determinable" finding does not transform that mandatory duty into a discretionary one. The ESA states that the Service is allowed one additional year to study a particular species and its environment, after which time it "must" designate critical habitat.<sup>200</sup> Congress chose words that clearly create a mandatory duty.<sup>201</sup>

An interpretation of the ESA that time-bars citizen suits repeals that mandatory duty whenever six years have passed. The ESA's citizen-suit provision is the only legal mechanism to force the Service to perform its obligation to designate critical habitat.<sup>202</sup> Citizen suits have become increasingly important because private litigation is the driving force behind most critical-habitat designations today.<sup>203</sup> The citizen-suit provision would lose much of its force if courts time-bar claims brought more than six years after the Service first fails to list a species' critical habitat. For example, the Eleventh Circuit's *Hamilton* decision means

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196. *Mastro Plastics Corp. v. Nat'l Labor Relations Bd.*, 350 U.S. 270, 285 (1956) (quoting *Heirs of Boisdoré*, 49 U.S. 113, 121 (1850)).

197. *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)) ("It is [a court's] duty to 'give effect, if possible, to every clause and word of a statute,' rather than to emasculate an entire section.").

198. *See* 16 U.S.C. § 1531(b) (2000).

199. *Id.* § 1533(a)(3)(A)(i).

200. *Id.* § 1533(b)(6)(C)(ii).

201. In contrast, Congress used "may" in other places in the ESA to indicate a discretionary duty. *See, e.g.*, § 1533(a)(3)(A)(ii) ("may, from time-to-time thereafter as appropriate, revise such [critical habitat] designation [after making the initial designation]"). *See* 3 NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 57.3 (6th ed. 2001) ("The form of the verb used in a statute, i.e., something 'may,' 'shall' or 'must' be done, is the single most important textual consideration determining whether a statute is mandatory or directory.").

202. *See supra* note 194.

203. *Id.* at 886 ("[T]he designation of critical habitat is now driven almost exclusively by litigation.").

that the Goldline Darter and Blue Shiner will be without designated critical habitats until the Service decides to act.<sup>204</sup> Without an effective mechanism to force the Service to designate critical habitat, many of the ESA's other protections would be undermined. The ESA requires that federal agencies consult with the Service to ensure their actions do not result in the "destruction or adverse modification" of threatened or endangered species' critical habitats.<sup>205</sup> If no one can force the Service to designate critical habitat for threatened and endangered species, federal agencies will not have to consult with the Service about actions that might affect the species' habitats.<sup>206</sup>

## 2. *The Eleventh Circuit's Textual Analysis in Hamilton is Flawed*

In contrast to interpretations that do not time-bar citizen suits, the Eleventh Circuit's textual interpretation of the ESA is awkward and strained. First, the court failed to ask the relevant question throughout its analysis. Because the court focused solely on when the Service's failure *arose*, it did not engage the argument that the failure is a continuing violation that would toll the statute of limitations until the failure is cured. Second, the court's proffered interpretation creates unnecessary inconsistency within the ESA itself.

The court based its analysis on the clauses "not later than" and "based on such data as may be available at that time."<sup>207</sup> The court argued that "not later than" creates a fixed point in time at which the violation arises.<sup>208</sup> It found additional textual support in the language "such data as may be available at the time,"<sup>209</sup> arguing that the clause would require the Service to ignore current data when promulgating a rule if the Service's duty was in fact ongoing.<sup>210</sup>

The court was correct to note that a violation "arises" on a single day. That, however, was not the relevant issue. The court should have focused its attention on when the violation *ended*, not on when it began,

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204. *See supra* note 194.

205. 16 U.S.C. § 1536(a)(2) (2000).

206. Agencies would still have to consult with the Service about actions "likely to jeopardize the continued existence of any endangered species or threatened species . . . ." *Id.* § 1536(a)(2).

207. *See* Ctr. for Biological Diversity v. Hamilton, 453 F.3d 1331, 1335 (11th Cir. 2006) (quoting 16 U.S.C. § 1533(b)(6)(C)(ii) (2000)).

208. *Id.*

209. *Id.* (quoting 16 U.S.C. § 1533(b)(6)(C)(ii) (2000)). As discussed *supra* note 123, the court misquoted the ESA during its textual analysis; the Act actually reads, "at *that* time." 16 U.S.C. § 1533(b)(6)(C)(ii) (2000) (emphasis added).

210. *Hamilton*, 453 F.3d at 1335 (quoting 16 U.S.C. § 1533(b)(6)(C)(ii) (2000)).

as the Supreme Court did in *National Railroad Passenger Corp. v. Morgan*.<sup>211</sup> In *Morgan*, the Court considered when a hostile work environment “occurs.” The Court held that a hostile environment first arises at a particular moment, but can then continue for years afterward.<sup>212</sup> The statute of limitations on a hostile-work-environment claim starts to run only when the employer eliminates workplace hostility—that is, *when the violation ends*.<sup>213</sup> The Eleventh Circuit’s textual analysis ignored the critical question: When did the Service’s duty to list critical habitat for the Goldline Darter and Blue Shiner *end*?

The Eleventh Circuit’s other basis of textual support is weak as well. The court concluded that the language “such data as may be available at the [sic] time”<sup>214</sup> meant the Service would have to rely on 1993 data when determining the minnows’ critical habitats in 2006. This analysis emerged at the district-court level: “It would be difficult now, after twelve years of changing conditions, to determine a critical habitat ‘based on such data as may [have been] available . . . [in 1993].’ Indeed, the area that may have been critical habitat in 1993 quite probably would have changed by [now].”<sup>215</sup> As noted by the Eleventh Circuit, such a result would be “anomalous.”<sup>216</sup>

A much more plausible interpretation of the statute is that “based on such data as may be available at that time” refers to the moment the Service “publish[es] a final regulation.”<sup>217</sup> This reading requires the Service to base its critical-habitat designations on the data available at the time it studies a species’ habitat with the goal of making a final critical-habitat designation, which is consistent with the goal of protecting threatened and endangered species. This interpretation is also consistent with other subsections of the ESA, one of which requires that the Service “designate critical habitat . . . on the basis of the best scientific data available . . . .”<sup>218</sup> Because the Service has the authority to revise a “not determinable” designation,<sup>219</sup> and because the ESA requires

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211. 536 U.S. 101 (2002).

212. *See id.* at 115–21.

213. *See id.* at 118.

214. *Hamilton*, 453 F.3d at 1335 (quoting 16 U.S.C. § 1533(b)(6)(C)(ii) (2000)). *See supra* note 123.

215. *Ctr. for Biological Diversity v. Hamilton*, 385 F. Supp. 2d 1330, 1337 (N.D. Ga. 2005), *aff’d*, 453 F.3d 1331 (11th Cir. 2006) (quoting 16 U.S.C. § 1533(b)(6)(C)(ii) (2000)).

216. *Hamilton*, 453 F.3d at 1335.

217. 16 U.S.C. § 1533(b)(6)(C)(ii) (2000).

218. *Id.* § 1533(b)(2).

219. *See id.* § 1532(5)(B) (“Critical habitat may be established for those species now listed as

that it use the best data available to do so, the Eleventh Circuit's interpretation that the Service would have to use only old data is inconsistent with another part of the Act.

Finally, even the Service itself seems to recognize the fallacy of the *Hamilton* court's textual analysis. For instance, after losing in *Schoeffler*, the Service argued against a proposed thirty-day deadline for listing the black bear's critical habitat by saying it would need more time to gather the new information necessary: "The Service's present best estimate is that significant changes in the landscape and habitat threats . . . will have rendered both the [1993] proposed critical habitat designation and the draft 1994 economic analysis obsolete."<sup>220</sup> In May 2008, the Service proposed the black bear's critical habitat.<sup>221</sup> The Service plans to consider data that was not available in 1993, when its duty to list habitat for the bear first arose.<sup>222</sup> The Service invited public comment on, among other things, "current or planned activities" that might impact proposed habitat.<sup>223</sup>

*C. Courts Do Not Further the Purposes of the Federal Statute of Limitations by Time-Barring Citizen Suits Brought to Force Designation of Critical Habitat*

The policy purposes of the general federal statute of limitations do not justify applying the statute to citizen suits against the Service. First, citizen suits are not unfair to the Service, because they do not create the danger of lost evidence or faded memories. Also, citizen suits promote social stability by bringing finality to uncertain situations. These cases are not likely to lack merit. Finally, Congress intended a broad waiver of the federal government's sovereign immunity when it passed the ESA's citizen-suit provision.

Courts do not further the purposes of the general federal statute of limitations by time-barring citizen suits to force the Service to designate critical habitat for threatened or endangered species. As a result of the

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threatened or endangered species for which no critical habitat has heretofore been established . . .").

220. *Schoeffler v. Kempthorne*, 493 F. Supp. 2d 805, 822 (W.D. La. 2007) (quoting Defendant's Brief Opposing Summary Judgment at 10 (No. 6:05CV01573), available at <http://www.law.washington.edu/notes/83washrev403n220.pdf>).

221. See Proposed Rule, Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Louisiana Black Bear (*Ursus americanus luteolus*), 73 Fed. Reg. 25,354 (May 6, 2008) (to be codified at 50 C.F.R. pt. 17).

222. See *id.* (describing data in the "background" section).

223. *Id.*

regular publication of listings and notices in the Federal Register on endangered and threatened species, there is no real danger of lost evidence, faded memories, or witnesses who have disappeared. A court would therefore have the entire record of the Service's action and inaction before it when making a decision.<sup>224</sup> Moreover, the determination is usually a purely legal determination, as the facts are not in dispute—the Service has either listed critical habitat for the threatened or endangered species or it has not.<sup>225</sup> In fact, the Service has on at least one occasion admitted its failure to comply with the Act.<sup>226</sup>

Additionally, a decision on the merits promotes the principle of finality more effectively than does a time-bar. The Service's inaction creates particular uncertainty because it is not final. If mandatory deadlines given by the ESA are not adhered to, interested parties are left waiting until the Service decides to take action. Citizen groups are therefore motivated to relentlessly petition the Service to designate habitat, attempting to force it to carry out its duty to consider the petition and take appropriate action.<sup>227</sup> Unless the species recovers without critical-habitat protection, extinction is the only event that could bring finality to this continuing exchange. In contrast, a ruling on the merits would bring resolution to groups' efforts, and it would end the uncertainty about the scope of the protections the Service must extend to a particular species.

Finally, courts act consistently with congressional intent regarding the scope of the government's waiver of sovereign immunity when they toll the statute of limitations and order the Service to designate critical habitat. Although waivers are generally construed narrowly, Congress's decision to include a citizen-suit provision in a statute represents a legislative judgment that the government should not be immune from suit in the context of that statute. Congress included the citizen-suit provision in the ESA so that private groups can enforce the Service's mandatory duties, including its obligation to designate critical habitat.<sup>228</sup>

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224. *See, e.g.*, 16 U.S.C. § 1533(b)(3)(A) (2000) ("The [Service] shall promptly publish each finding made under this subparagraph in the Federal Register.").

225. *See, e.g.*, *Ctr. for Biological Diversity v. Hamilton*, 385 F. Supp. 2d 1330, 1335 (N.D. Ga. 2005) ("The statute of limitations issue here is a pure question of law . . .").

226. *See, e.g.*, *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1268 (11th Cir. 2007) ("We are troubled by the Service's apparent practice of routinely delaying critical habitat designation until forced to act by court order."); *Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv.*, No. 3:07CV00358, 2007 WL 4117978, at \*1 (D. Or. Nov. 16, 2007) ("[The Service] admits its failure to comply with the statute.").

227. *See* 50 C.F.R. § 424.14(d) (2007).

228. *See Alabama-Tombigbee Rivers Coal*, 477 F.3d at 1269 (explaining how the history of the

The scope of the waiver is coterminous with the Service's mandatory duties. When courts allow citizen suits to proceed, they facilitate the very goal Congress had in mind when it waived the government's sovereign immunity—vigorous private enforcement of the ESA.

## CONCLUSION

Courts should treat the Service's failure to designate critical habitat for threatened and endangered species as a continuing violation that tolls the statute of limitations. Such an approach is consistent with the overarching policy purpose of the ESA—protecting threatened and endangered species and their habitats. Construing the failure to designate critical habitat as a continuing violation is consistent with the plain language of the ESA, in that it empowers citizens to force the Service to comply with its mandatory duties. It also prevents the Service from escaping its responsibilities through delay. Finally, Congress intended that very result when it waived the government's sovereign immunity by including a citizen-suit provision in the ESA.

Courts should reject the Eleventh Circuit's approach in the *Hamilton* decision. The court's reasoning is strained because it relies on a counterintuitive reading of the statute's plain text and creates inconsistencies between provisions within the ESA. Congress intended for the designation of critical habitat to be a mandatory duty that the Secretary could not escape by raising the statute of limitations as a defense. Unless courts construe the Service's failure to perform its mandatory duty as a continuing violation, they will frustrate congressional intent. Species that are already endangered might face extinction, and no one could compel the Secretary to designate critical habitat. Characterizing the failure to designate critical habitat as a continuing violation furthers the purpose of the ESA, and guarantees a stronger enforcement mechanism for agency compliance.

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ESA shows that Congress intended for critical habitats to be designated even if delayed, and noting that "Congress intended to protect endangered species, not to strip them of protection in order to motivate an administrative agency to protect them.").